

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE VINCE CHHABRIA

LAURA MARKS, GAYLIA PICKLES &)	
DONNA VANDIVER, INDIVIDUALLY)	
AND ON BEHALF OF ALL OTHERS)	
SIMILARLY SITUATED,)	
)	
PLAINTIFFS,)	
)	
VS.)	NO. C 3:15-CV-05329 VC
)	
KATE SPADE AND COMPANY, A)	
DELAWARE CORPORATION; AND)	
DOES 1-50,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANTS.)	THURSDAY
)	MAY 5, 2016
)	

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

RECORDING 10:20 A.M. - 10:31 A.M.

APPEARANCES:

**FOR PLAINTIFF
PICKLES**

MARKUN, SUZMAN, FRENIERE, COMPTON, LLP
17383 WEST SUNSET BOULEVARD
SUITE A 380
PACIFIC PALISADES, CALIFORNIA 90272

BY: MARK A. OZZELLO, ESQUIRE

(FURTHER APPEARANCES ON FOLLOWING PAGE)

**REPORTED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR
RETIRED OFFICIAL COURT REPORTER, USDC**

APPEARANCES (CONTINUED)

**FOR PLAINTIFF
VANDIVER**

WILLIAMSON LAW FIRM, LLC
1770 ST. JAMES PLACE
SUITE 100
HOUSTON, TEXAS 77056

BY: CHE DAWN WILLIAMSON, ESQUIRE

FOR DEFENDANTS

SHEPPARD, MULLIN, RICHTER & HAMPTON,
LLP
1901 AVENUE OF THE STARS, SUITE 1600
LOS ANGELES, CALIFORNIA 90067

BY: P. CRAIG CARDON, ESQUIRE

1 THURSDAY, MAY 5, 2016

10:20 A.M.

2 PROCEEDINGS

3 ---000---

4 **THE CLERK:** CALLING CASE NUMBER 15-CV-5329, PICKLES,
5 ET AL. VERSUS KATE SPADE AND COMPANY.

6 COUNSEL, PLEASE STEP FORWARD AND STATE YOUR
7 APPEARANCES FOR THE RECORD.

8 **MR. OZZELLO:** GOOD MORNING, YOUR HONOR. MARK OZZELLO
9 FOR THE PLAINTIFFS.

10 **THE COURT:** GOOD MORNING.

11 **MS. WILLIAMSON:** CHE WILLIAMSON FOR THE PLAINTIFFS.

12 **THE COURT:** GOOD MORNING.

13 **MR. CARDON:** GOOD MORNING, YOUR HONOR. CRAIG CARDON
14 FOR THE DEFENDANT KATE SPADE AND COMPANY.

15 **THE COURT:** GOOD MORNING. YOU KNOW, I DON'T KNOW HOW
16 IMPORTANT THIS MOTION IS, BECAUSE I ASSUME THAT IF I GRANTED
17 THE MOTION TO DISMISS, YOU PROBABLY WOULD BE ABLE TO ADD FACTS
18 THAT ALLOW YOU TO STATE A CLAIM. BUT I DO FIND IT DIFFICULT,
19 EVEN IF IT MAY NOT BE THAT IMPORTANT.

20 AND I DO HAVE QUITE A BIT OF SYMPATHY FOR THEIR
21 ARGUMENT, THAT IF WHAT YOU HAVE INCLUDED IN THE COMPLAINT IS
22 ENOUGH, THAT THAT MEANS THAT ANY TIME A STORE ADVERTISES A
23 FORMER PRICE, OR "OUR PRICE," AND THEN UNDERNEATH IT PUTS "SALE
24 PRICE," OR "CURRENT PRICE," OR WHATEVER IT IS, THAT YOU COULD
25 HAUL SOMEONE INTO COURT ON A FRAUD CLAIM, YOU KNOW, AS LONG AS

1 YOU HAVE A PLAINTIFF WHO BOUGHT IT.

2 AND I FOUND THE ARGUMENT IN THEIR REPLY PRETTY
3 PERSUASIVE, THAT YOU ARE SORT OF CONFLATING THE DISTINCTION
4 BETWEEN THEORY OF DECEPTION AND THEORY OF FRAUDULENT CONDUCT.
5 I CAN'T REMEMBER IF THAT WAS EXACTLY HOW YOU PUT IT, BUT IT WAS
6 SOMETHING ALONG THOSE LINES. I FOUND THAT QUITE PERSUASIVE,
7 AND I THINK THAT'S WHAT YOU ARE DOING.

8 AND I THINK YOU HAVE ENOUGH IN THE COMPLAINT TO
9 ALLEGE -- YOU KNOW, TO SATISFY THE DECEPTION REQUIREMENT THAT
10 YOUR CLIENT, YOU KNOW -- OR THE RELIANCE REQUIREMENT, OR
11 WHATEVER YOU CALL IT, THAT YOUR CLIENT BOUGHT THIS PRODUCT
12 BECAUSE SHE BELIEVED, OR THEY BELIEVED -- YOUR CLIENTS BOUGHT
13 THESE PRODUCTS BECAUSE THEY BELIEVED THAT THEY WERE PREVIOUSLY,
14 AT THE RETAIL SHOP, SOLD AT A MUCH HIGHER PRICE. BUT I'M NOT
15 SURE YOU'VE ALLEGED ENOUGH TO SHOW THAT WHAT THEY BELIEVED IS
16 TRUE. IN OTHER WORDS, THAT, IN FACT, THE PRODUCTS WERE NOT
17 PREVIOUSLY SOLD AT A HIGHER PRICE AT A RETAIL STORE, OR AT THE
18 OUTLET STORE, OR WHATEVER.

19 AND I ASSUME THAT IF YOU, YOU KNOW, PUT A LITTLE MORE
20 EFFORT INTO IT, YOU PROBABLY COULD ADD FACTS TO SUPPORT YOUR
21 ALLEGATION THAT IT WAS NEVER SOLD AT A RETAIL STORE. I IMAGINE
22 THERE ARE A LOT OF THINGS YOU COULD DO OR COULD HAVE DONE. YOU
23 COULD HAVE SENT PEOPLE INTO THE STORE TO ASK STORES -- TO ASK A
24 BUNCH OF QUESTIONS OF EMPLOYEES. YOU MIGHT HAVE BEEN ABLE TO
25 USE THE WAYBACK MACHINE TO SEE IF THERE WERE ANY ADVERTISEMENTS

1 FROM KATE SPADE RETAIL STORES, OR ONLINE STORES, OR WHATEVER,
2 FOR THIS PRODUCT AT A HIGHER PRICE.

3 YOU MIGHT HAVE SAID A LOT MORE THAN YOU DID SAY IN
4 THE COMPLAINT ABOUT THE ALLEGATION THAT, YOU KNOW, 82 PERCENT
5 OF PRODUCTS IN OUTLET STORES ARE MADE JUST FOR THE OUTLET
6 STORE. THERE'S A FLEETING REFERENCE TO THAT, REALLY, AND I
7 DON'T KNOW HOW SUPPORTABLE IT IS. YOU KNOW, THE REPORTER
8 DESCRIBING NOT EVEN WITH QUOTES THE STATEMENT OF SOME ANALYST
9 IN A DAILY NEWS ARTICLE PUT IT IN A FOOTNOTE.

10 SO, YOU KNOW -- I GUESS THAT'S MY -- IT'S A TENTATIVE
11 REACTION, BUT THAT'S MY REACTION THAT YOU PROBABLY HAVEN'T DONE
12 ENOUGH TO SUPPORT YOUR THEORY OF FRAUD AS OPPOSED TO YOUR
13 THEORY OF RELIANCE.

14 **MR. OZZELLO:** YOUR HONOR, JUST A FEW COMMENTS. FIRST
15 OF ALL, I THINK WE HAVE DONE ENOUGH. WHETHER OR NOT IT'S
16 PROPERLY PLED IS MAYBE THE ISSUE IN THE COURT'S MIND.

17 **THE COURT:** THAT'S ALL I WAS REFERRING TO, IS WHAT'S
18 IN THE COMPLAINT, NOT WHAT YOU'VE ACTUALLY DONE.

19 **MR. OZZELLO:** BUT LET'S TALK ABOUT THAT, BECAUSE,
20 REALLY, WHAT THE COURT'S TELLING ME IS THAT, YOU KNOW, WE NEED
21 TO PUT MORE OF THE INVESTIGATIVE INFORMATION INTO THE
22 COMPLAINT, AND, QUITE FRANKLY, I JUST DON'T THINK THAT'S
23 REQUIRED IN THIS PARTICULAR TYPE OF CASE. SO ALL OF THE CASES
24 THAT ARE CITED AND RELIED UPON BY DEFENDANT ARE COMPARE-AT
25 CASES, WHERE THE PLAINTIFF HAS THE ABILITY TO GO OUT IN THE

1 MARKETPLACE AND COMPARE PRODUCT WITH OTHER RETAIL OUTLETS.

2 HERE WE HAVE A SITUATION WHERE THE PRICE TAG SAYS "OUR PRICE,"
3 AND YOU KNOW WHAT, I JUST --

4 **THE COURT:** I AGREE WITH YOU, AND I THINK IT'S
5 IMPORTANT THAT THEY SAY -- THAT THE PRICE TAG SAYS "OUR PRICE,"
6 AS OPPOSED TO "COMPARE AT" OR, YOU KNOW, "SUGGESTED RETAIL," OR
7 WHATEVER, YOU KNOW --

8 **MR. OZZELLO:** YEAH.

9 **THE COURT:** -- THE VARIOUS OTHER THINGS THAT
10 ADVERTISERS SAY. I AGREE WITH YOU THAT THAT'S IMPORTANT, BUT
11 THINK WHAT YOU'VE SAYING IS NOT RESPONSIVE TO WHAT I'VE SAID
12 BECAUSE --

13 **MR. OZZELLO:** I'M GETTING THERE.

14 **THE COURT:** OKAY. GO AHEAD.

15 **MR. OZZELLO:** I'M GETTING THERE, BECAUSE WHAT YOU'RE
16 TALKING ABOUT IS THE RELEVANT MARKET, AND THE RELEVANT MARKET
17 HERE IS SPECIFICALLY LIMITED TO DEFENDANT'S RETAIL AND OUTLET
18 STORES.

19 **THE COURT:** I AGREE WITH YOU. SO WHY IS THAT --

20 **MR. OZZELLO:** SO ALL OF THAT --

21 **THE COURT:** IT'S STILL NOT RESPONSIVE TO WHAT I'M
22 SAYING.

23 **MR. OZZELLO:** ALL OF THAT INFORMATION IS WITHIN THE
24 PURVIEW OF THE DEFENDANTS.

25 **THE COURT:** NO, IT'S NOT. WHAT ABOUT ALL THE THINGS

1 THAT I JUST SAID THAT YOU COULD POTENTIALLY DO TO INVESTIGATE
2 WHETHER IT IS, IN FACT, TRUE THAT THEY NEVER SOLD -- THEY NEVER
3 OFFERED THE PRODUCT FOR SALE AT A RETAIL STORE OR AT THEIR
4 OUTLET STORE FOR "OUR PRICE."

5 I MEAN, AGAIN, WHAT I STARTED OFF BY SAYING IS THAT
6 IT SEEMS TO ME THAT IF YOU CAN HAUL THEM INTO COURT ON A FRAUD
7 CLAIM BASED ON WHAT YOU'VE ALLEGED, IT STANDS FOR THE
8 PROPOSITION THAT ANY TIME ANY OUTLET ADVERTISES A PRODUCT OR
9 HAS A PRICE TAG FOR A PRODUCT AND HAS ONE PRICE CROSSED OUT AND
10 ANOTHER PRICE LISTED, THAT BASED ON THAT ALONE, THEY COULD BE
11 HAULED INTO COURT ON A FRAUD CLAIM. AND THAT MAKES ME KIND OF
12 UNCOMFORTABLE, ESPECIALLY WHEN IT'S NOT NECESSARILY THE CASE
13 THAT IT IS PURELY -- AND ESPECIALLY IN THIS DAY AND AGE,
14 WHEN -- THAT IT'S PURELY WITHIN THEIR KNOWLEDGE WHETHER THEY
15 PREVIOUSLY SOLD THE PRODUCT FOR A HIGHER PRICE.

16 **MR. OZZELLO:** WELL, I MEAN, YOUR HONOR, JUST A COUPLE
17 OF DAYS AGO JUDGE ROGERS CAME OUT WITH AN OPINION IN THIS VERY
18 COURT THAT KIND OF TRACKED OUR POSITION.

19 **THE COURT:** BUT YOU'RE NOT ANSWERING MY QUESTION. I
20 READ HER OPINION. BUT I'M ASKING YOU A QUESTION ABOUT -- IS
21 IT -- AM I WRONG THAT IF I RULE IN YOUR FAVOR, THAT WOULD STAND
22 FOR THE PROPOSITION THAT ANY TIME A STORE ADVERTISES -- HAS A
23 PRICE TAG THAT HAS ONE PRICE CROSSED OUT AND ANOTHER PRICE
24 LISTED, THAT BASED ON THAT ALONE YOU COULD HAUL THEM INTO COURT
25 ON A FRAUD CLAIM.

1 **MR. OZZELLO:** I DON'T NECESSARILY THINK THAT --

2 **THE COURT:** OKAY. WHO WOULD BE SAFE FROM A FRAUD
3 CLAIM IF YOUR POSITION IS CORRECT?

4 **MR. OZZELLO:** I THINK WHO WOULD BE SAFE WOULD BE A
5 RETAILER WHO PRODUCES ITS OWN PRODUCT AND SELLS ITS PRODUCT AT
6 ITS "OUR PRICE," AND THAT'S A PREVAILING MARKET PRICE.

7 **THE COURT:** YES, BUT -- BUT WHAT -- WHAT -- HOW DO WE
8 KNOW -- I MEAN, YOU SEEM TO HAVE FILED A COMPLAINT WHICH SAYS,
9 LOTS OF STORES DO THIS, AND, THEREFORE, WE BELIEVE KATE SPADE
10 DID THIS. SO, YOU KNOW, YOU'RE --

11 **MR. OZZELLO:** I UNDERSTAND THE COURT'S POSITION, AND,
12 BELIEVE ME, WE HAVE FACTS SUFFICIENT, I THINK --

13 **THE COURT:** THEN WHY DIDN'T YOU PUT THEM IN THE
14 COMPLAINT?

15 **MR. OZZELLO:** WELL, NUMBER ONE, WE FELT THEY WEREN'T
16 NECESSARY. WHENEVER WE LOOKED AT CASES LIKE SPAN, AND WE
17 LOOKED AT -- THERE WAS ONE OTHER CASE THAT SAYS THAT, YOU KNOW
18 WHAT, THAT INFORMATION IS REALLY WITHIN THE PURVIEW OF THE
19 DEFENDANTS, AND IT'S NOT REQUIRED AT THIS PARTICULAR STAGE OF
20 THE PROCEEDING. AND THEN, NUMBER TWO, WE DIDN'T WANT TO REVEAL
21 WORK PRODUCT, AND I THINK THAT'S SOMETHING --

22 **THE COURT:** I DON'T UNDERSTAND -- I DON'T UNDERSTAND
23 THAT. I MEAN, YOU CAN -- YOU CAN INCLUDE ALLEGATIONS -- FOR
24 EXAMPLE, LET US SAY, JUST AS AN EXAMPLE, YOU HAD AN ALLEGATION
25 THAT SAID "NO ADVERTISEMENT" -- YOU KNOW, KATE SPADE'S WEBSITE

1 OVER THE PAST THREE MONTHS APPEARS ON THE INTERNET ARCHIVES 20
2 TIMES, 20 DIFFERENT DAYS, AND ON NONE OF THOSE DAYS DOES THERE
3 APPEAR AN ADVERTISEMENT FOR PRODUCT "X" AT PRICE "Y." HOW
4 WOULD AN ALLEGATION LIKE THAT DISCLOSE ATTORNEY WORK PRODUCT?

5 **MR. OZZELLO:** AGAIN, I UNDERSTAND THE COURT'S
6 POSITION, AND WE CAN CERTAINLY MAKE THOSE CHANGES TO THE
7 COMPLAINT. I'M NOT GOING TO SIT HERE AND TELL THE COURT THAT
8 THAT IS NOT POSSIBLE, AND I'M NOT GOING TO SIT HERE AND
9 DISAGREE WITH THE COURT BECAUSE I UNDERSTAND YOUR REASONING.

10 **THE COURT:** OKAY. ALL RIGHT. I'M GOING TO -- DO YOU
11 WANT TO -- DO YOU WANT ME TO ISSUE A WRITTEN RULING, OR DO YOU
12 WANT TO JUST REQUEST LEAVE TO AMEND YOUR COMPLAINT?

13 **MR. OZZELLO:** WE'LL REQUEST LEAVE, YOUR HONOR.

14 **THE COURT:** OKAY. I'LL GIVE YOU LEAVE TO AMEND YOUR
15 COMPLAINT.

16 **MR. OZZELLO:** OKAY.

17 **THE COURT:** THANK YOU.

18 **MR. CARDON:** THANK YOU, YOUR HONOR.

19 (PROCEEDINGS ADJOURNED AT 10:31 A.M.)
20
21
22
23
24
25

CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE
ACTION.



JOAN MARIE COLUMBINI

MAY 16, 2016